CASE STUDY II

GIPC Course: INSOL International

Introduction

1. There are three companies which are in need of protection in this case: Efwon Investments, Efwon Trading and Efwon Romania. I have devised a strategy for ensuring the protection of each of these companies, using the Scheme of Arrangement as known in the UK Companies Act, 2006. To the extent that I have had to make assumptions or draw inferences, I have endeavoured to be explicit about such inferences and assumptions so that my thinking can be followed.
2. I have given my advice on the basis that it was sought in early 2019. This is implied in the case study, which refers to the default of payments to Efwon Trading by Efwon Romania "due to be made in early 2019".
3. I first identify the risks faced by the three companies before turning to my strategy to create the space and legal protection for the use of Schemes of Arrangement. The precise contents of these Plans and Schemes is explained. I end by discussing some counterfactual situations surrounding Brexit and laws which were not in force at the time of my advice.

Companies at Risk

4. At the top of the structure (if that word is not inappropriate) sits Efwon Investments. It is not clear what assets it has since its precise relationship with Efwon Trading is ambiguous in the case study. Here rests much of the risk faced by Mr Maximov because it is at this level that the various US lenders put in USD250 million. It is at this level that the security over various properties is given and, of course, security over projected profits from the investment further downstream.
5. Below (or beside) Efwon Investments is Efwon Trading. Efwon Trading is exposed to USD100 million of debt in the form of a loan advanced by a Monaco lender. Efwon Trading is at risk in a liquidation of Efwon Romania because it lent Efwon Romania USD 150 million in 2010 and a further USD100 million in 2011 and a further USD100million the year after. The USD100 million obtained from the Monaco lender was advanced to Efwon Romania also. (Total exposure to Efwon Romania USD450 million). Very little of this money seems to have made its way back to Efwon Trading and Efwon Investments, though precise figures seem to be unavailable.
6. Efwon Romania is in debt to Efwon Trading in the amount of USD450 million. It also faces claims in an unknown (but substantial) amount for personal injuries suffered by the drivers and

is now faced with an imminent winding up order in Romania. What other creditors (trade creditors or otherwise) there might be is unknown.

Scheme of Arrangement – the threshold

7. Central to this advice to Mr Maximov is the use of the Scheme of Arrangement tool provided for in the UK Companies Act, 2006. A UK Scheme of Arrangement is a court-approved mechanism which permits a company to enter into a compromise or arrangement with its shareholders and its creditors, subject to the receipt of requisite shareholder approvals and court sanction. Schemes are known for their flexibility and are widely used both for the restructuring of insolvent companies and for the general corporate reorganization of solvent companies. Indeed, Schemes of Arrangement are not considered insolvency proceedings (a point to which I shall return) and during the United Kingdom's membership of the European Union, Schemes were not a proceeding covered by Annex A of the European Insolvency Regulation.
8. One of the benefits of the UK Scheme is that it can apply to any company that is capable of being wound up under the Part V of the Insolvency Act, 1986 (or the Northern Irish equivalent, which is the Insolvency (Northern Ireland) Order 1989). Therefore, a Scheme can be applied to a non-UK registered company (such companies being capable of being wound up as unregistered companies). In the context of Mr Maximov's problems, this is very significant. The proposed Scheme can, in principle, cover Efwon Investments, Efwon Trading, Efwon Romania and Efwon Hong Kong (though I don't propose to cover Efwon Hong Kong in much detail in this advice).
9. It is not simply a case that the UK courts will assume jurisdiction over any company just for the asking. For each of the companies (with the exception of Efwon Trading, which is a UK registered company anyway), the Court will have to be satisfied that it would exercise its discretion to wind the companies up as foreign companies. That would require three things: (1) there must be a sufficient connection with England which may, but does not necessarily have to, consist of assets within the jurisdiction; (2) there must be a reasonable possibility, if a winding-up order is made, of benefit to those applying for the winding-up order; and (3) one or more persons interested in the distribution of assets of the company must be persons over whom the court can exercise a jurisdiction. (See Re Drax Holdings Limited [2004] 1 WLR 1049)
10. Sufficient connection is difficult to define with precision. It is perhaps like an elephant – hard to describe but easy to recognize. Case law has nevertheless offered some guiding principles and the UK courts have not adopted a formalistic or overly technical approach to sufficient connection. The Court of Appeal confirmed in Stoczina Gdanska SA v Latreefers Inc (No. 2) [2001] 2 BCLC 116 that the presence of assets of the company in the United Kingdom was not a precondition to the exercise of jurisdiction to make a winding up order, but this will often be the basis for seeking to engage Part 26 of the Companies Act in the first place.

11. Financing arrangements which contain English law and jurisdiction clauses have been held to provide a sufficient connection with the UK for the purpose of a Scheme of Arrangement (Re Drax Holdings Limited [2004] 1 WLR 1049). Centre of Main Interest ("COMI") or an establishment in the UK will also suffice. It is important to note here, though, that while a UK COMI will satisfy the sufficient connection test, the concepts of COMI and sufficient connection are separate and COMI is not a precondition to satisfying the sufficient connection test. COMI is discussed further below.
12. The case study is not entirely clear on a number of the facts, but I will attempt to demonstrate how each of the companies has a sufficient connection with the UK from the information available.
    a. Efwon Investments may or may not be the direct parent of Efwon Trading. This point is ambiguous in the case study. If it is the parent of Efwon Trading, then Efwon Investments' shareholding in Efwon Trading would constitute an asset within the United Kingdom, thus satisfying the sufficient connection test. If Efwon Investments and Efwon Trading are merely sister companies, then it may be enough that the arrangements between them, whereby profits from Efwon Trading flow upstream to Efwon Investments, constitute an asset of Efwon Investments in the United Kingdom.
    b. Efwon Romania and Efwon Hong Kong are wholly owned subsidiaries of Efwon Trading. In a recent Hong Kong Court of Final Appeal case, it was held that the presence of shareholders within the jurisdiction was a *weighty* factor going to the discretion of the HK Court to wind up a BVI company which was a wholly owned subsidiary of a HK company (see Kam Leung Sui Kwan v Kam Kwan Lai & Ors FACV 4/2015. In its judgment, the Court lamented the dearth of authorities in this area). Naturally, these issues are highly fact specific, but the fact that both companies are wholly owned by a UK company will be a factor carrying great weight in the Court's determination of the sufficient connection test. I do not anticipate the English courts will adopt a radically different approach from the Hong Court of Final Appeal.
13. To the extent that the gateways described above might be insufficient, a prudent step would be to change any and all financing documentation between the various Efwon companies so that they contain choice of law and choice of forum clauses in favour England & Wales. It has been noted above that the English courts will consider the sufficient connection test to be met where such clauses in financing agreements exist. This step will also be important for Mr Maximov further down the line when the Efwon Romania Scheme is to be given effect in Romania (see below).
14. For completeness, it would appear from the facts as described in the case study that there will be little difficulty in persuading the Court that the those applying for the Schemes will benefit under it. The Schemes will benefit a series of inter-related companies and secure new and

ongoing finance. To the extent that the drivers in Romania are contingent creditors, the Efwon Romania Scheme will (i) give them a voice in the restructuring; and (ii) potentially crystallise their contingent claims without the need for a costly and protracted trial in Romania (see below).

15. Furthermore, the Court will have jurisdiction over one or more persons interested in the distribution of the assets if each of the companies inserts English choice of law and choice of forum clauses into its financing documentation. Therefore, the three requirements identified in Re Drax Holdings will have been met.

Schemes of Arrangement – the mechanics

16. Once Mr Maximov is satisfied that he can use the Scheme in the United Kingdom for each of the companies at risk, he must consider the mechanics of how a Scheme works in practice.
17. The process of structuring and implementing an English Scheme of Arrangement requires the parties to a Scheme to go through the following stages:
    a. The company proposing the Scheme must seek a court order convening creditor and/or member meetings in order to vote on the proposed Scheme (s.896 of the CA 2006);
    b. The company must provide all parties required to attend the meeting(s) a statement setting out key aspects of the proposed Scheme (s.897 CA 2006);
    c. A meeting or meetings are convened at which the attendees are separated into classes and will be required to vote on the proposed Scheme. At least 50% in number constituting 75% in value of each relevant class of creditors must vote in favour of the Scheme for it to proceed to sanction;
    d. A class must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult with a view to their common interest. Determining how classes are to be split is a delicate balancing exercise and susceptible to litigation;
    e. Once the Scheme has been approved by the requisite majority of each class, the company will apply to the court and request that its sanction of the Scheme (s.899 CA 2006);
    f. The Scheme will become effective upon delivery of the relevant Order by the court to the Registrar of Companies in England & Wales and will bind all creditors of each relevant class. The issue of timing is, for obvious reasons, connected to the complexity of the proposed Scheme. It is estimated that intensive negotiations on the terms of a Scheme can yield results in 6 to 8 weeks.

Stay

18. In tandem with an application under Part 26 of the Companies Act (initially to call a meeting, and then to sanction the Scheme), my advice to Mr Maximov would be to ask the Court to grant a stay on any existing claims against any of the companies in England & Wales, or by people

or companies over whom the English courts have jurisdiction. Whether or not a stay is needed will depend on whether the Monaco lender has already moved to sue for repayment of its loan to Efwon Trading[1], but it is useful for Mr Maximov to know that the spectre of a claim by the Monaco lender can be quieted with a stay.

19. While the Companies Act, 2006 does not provide for a moratorium pending the sanction of a proposed Scheme, the Courts have not found that to be an impediment to other forms of relief. In Bluecrest Mercantile NV v Vietnam Shipbuilding Industry Group [2013] EWHC 1146 (Comm), the High Court was prepared to exercise its powers under the Civil Procedure Rules (namely, CPR r3.1(2)(f)) to stay claims brought by dissentient creditors in circumstances where a Scheme of Arrangement had been proposed.
20. Prior to that case, the law in this area was unclear. Whether a stay will be granted will of course depend on the facts of an individual case, but Bluecrest offers some insight into what issues the Court will consider to be relevant.
21. First, the degree to which the Scheme has been formulated and developed will be considered. A concrete proposal which is reasonably well developed with a reasonable prospect that it will be sanctioned by the Court is much more likely to benefit from a stay than a last-minute expression of interest in a Scheme, which might be little more than an attempt to avoid judgment or winding-up proceedings. The Court will have to weigh the likely benefit to creditors as a whole, together with the possible risk of misuse of the Scheme tool to thwart legitimate claims or petitions.
22. Secondly, the Court will look to the level of creditor support for the Scheme. If only a few creditors are holding out when the majority are favourably disposed to the Scheme, the Court might take the view that the dissentient creditors are seeking to press an advantage by launching a claim. Under the Companies Act, a Scheme requires the approval of 75% of the creditors (by value). If there is good evidence that this threshold can be met a stay can be obtained. While the various creditors in the Bluecrest case had given binding undertakings to support the proposed Scheme, this is by no means a precondition. Nevertheless, it might be worth seeking such undertakings should the requirement for a stay arise.
23. Thirdly, the Court will assess the position of claims if the Scheme is ultimately unsuccessful. A stay could prejudice a creditor who has not been able to enforce against the company. In certain situations (for example, where the creditor's security consists of a floating charge over perishable goods) delay can result in significant prejudice. This is part of the Court's weighing exercise.

[1] Note that the period of time for service of a Claim Form is 4 months (CPR r7.5), so a claim could be in existence but Efwon Trading might not yet have been served. Once/if served it should be in a position to make the application for a stay straightaway.

24. Lastly, the Court will be keen to know how long the stay is likely to be for, and what timetable is proposed for the Scheme's implantation. In Bluecrest, a two-month stay was granted. The Court can of course grant a longer or shorter stay, depending on any of the factors noted above, or other considerations. Having clear deadlines can help minimise any prejudice suffered by the creditor the subject of the stay.

Foreign Representative

25. In the recent Scottish case of Chang Chin Fen v Cosco Shipping (Qidong) Offshore Ltd [2021] CSOH 94, the Court of Session refused to recognise a Singaporean Scheme of Arrangement and related moratorium. Interestingly, however, the Singapore Court had in that case granted the Director of Finance of the company the subject of the Scheme the status of Foreign Representative for the purposes of the Model Law. On that basis the Director of Finance made applications to the Scottish Court.
26. While the Court of Session refused the remedies sought by the Foreign Representative, it did not impugn or question the decision of the Singaporean Court to designate a Director of a company the subject of a proposed Scheme to be a Foreign Representative. I would urge Mr Maximov to seek to have one of companies' directors designated as the Foreign Representative for the purposes of the Scheme so that the relevant person can appear in the US and Romania (see below).

Steps to be taken in Romania

27. If a Director is designated by the English courts as a Foreign Representative within the meaning of the Model Law, there are certain steps that can and should then be taken in Romania. I propose that these steps be taken once the High Court in England has granted an order to convene a shareholders'/creditors; meeting pursuant to s.896 of the Companies Act, 2006. While this is unorthodox, the primary concern here is to ensure that Efwon Romania is properly brought into the fold and can be controlled. The appointment of a liquidator in Romania could spell disaster for Mr Maximov otherwise since it is there that the F1 licences are held. The recognition of the proposed Scheme could help hold the ring.
28. First, the Foreign Representative can seek to have the Scheme recognised as a Foreign Main Proceeding or a Foreign non-Main Proceeding. Depending on how the Scheme is recognised, there will be relief available to the Foreign Representative to assist the Scheme.
29. Under the Model Law, a Foreign proceeding is defined in Article 2(a) as

> "*a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation*."

30. In principle, this definition would seem to cover a proposed Scheme of Arrangement under UK law. Such Schemes are collective, subject to Court sanction and for the purpose of reorganisation. A law "relating to insolvency", taken at its widest, could be satisfied by the Companies Act also. The requirement that a company satisfy the test for winding up under the Insolvency Act 1986 before it can avail of a Scheme of Arrangement meets the threshold in my view. This approach would be consistent with recognising proceedings for a voluntary winding up of a solvent company.
31. When the Model Law was adopted by Japan and by South Korea, the scope for recognition of a Scheme of Arrangement under the Model Law was discussed. In Japan, Article 2 of the Model Law, as implemented in the Japanese legislation, defines 'foreign insolvency proceedings' as proceedings outside Japan that correspond or are equivalent to, among others, a bankruptcy proceeding, a civil rehabilitation proceeding, and a corporate reorganisation proceeding.
32. It has been argued that what amounts to an equivalent proceeding under Japanese insolvency law would be the subject of judicial interpretation, as the Japanese legislation does not explain the specific characteristics of foreign insolvency law.[2]
33. In South Korea, the relevant legislation which incorporates Article 2 of the Model Law, specifically refers to rehabilitation. It has been argued that Schemes of Arrangement are likely to be regarded as proceedings similar to rehabilitation proceedings for the purposes of recognition in South Korea.[3]
34. I cannot be absolutely confident about what local variations have been made to the Model Law in Romania (and Romanian legal advice should be sought in this regard), but it appears that the Model Law has been adopted in Romania without too much variation, and no seeming change to the definition of Foreign Proceeding.[4] Article 9 of the Romanian International Insolvency Law (which incorporates the Model Law into Romanian Law) reads: "*In the interpretation of the present law its international origin shall be taken into account, as well as the need to promote uniformity in its application and to respect good faith."* This should provide some comfort that the Romanian Courts will strive to seek to recognize Schemes in the same way that other Model Law countries have.
35. Once it is established that the Scheme has a Foreign Representative who seeks to have the Scheme recognised in Romania, it becomes important to consider where the COMI of Efwon Romania is located. There is a key distinction between COMI under the Model Law and COMI within the context of the EU insolvency framework. COMI has consequences upon recognition

[2] Wai Yee Wan and Gerard McCormack 'Implementing Strategies for the Model Law on Cross-Border Insolvency: The Divergence in Asia-Pacific and Lessons for UNCITRAL' 36 *Emory Bankruptcy Developments Journal* 1 pp 55-97 at p 79

[3] *Ibid.*

[4] Sandile Khumalo, 'International Response to the UNCITRAL Model Law on Cross-Border Insolvency' *International Insolvency Institute* (2004) at pp 23-25

under the Model Law, whereas under European legislation, COMI determines where the main proceedings should actually commence.

36. In short, if the COMI is in the place where the Foreign Proceeding is taking place then the Romanian Courts will characterise that as the Foreign Main Proceeding. If the COMI is elsewhere, then there is no automatic recognition and the Foreign Representative will have to apply for specific relief, which the Romanian Court will have discretion to grant or refuse.
37. Pursuant to Article 21 of the Romanian Inernational Insolvency Law, this has certain automatic effects. These effects are drafted somewhat differently from Article 20 of the Model Law (its equivalent). The Romanian provision reads:

> *"(1) Upon recognition of a foreign main proceeding, the initiation and continuation of requests or actions of an individual nature, concerning assets, rights and obligations of the debtor, and acts, operations and any other measures of individual executions over the debtor's assets shall be suspended* de jure.
>
> *(2) On a request of a creditor holding a claim guaranteed with a mortgage, pledge or another real movable or possessory lien of any kind, the court can remove the stay provided in paragraph (1), within conditions provided in law 64/95.*
>
> *(3) Upon recognition, the exercise of the right to alienate, encumber or dispose in any other manner of the debtor's assets shall be suspended and acts carried out in violation of these provisions shall be null* de jure.
>
> *(4) The exception to the application of paragraph (3) shall be the exercise of a trader's right to carry out acts, operations and payments that meet the ordinary conditions of exercise of the current activity, for which the court may decide stay within the conditions provided in Article 22.*
>
> *(5) Recognition of foreign main proceedings shall preclude the initiation of the flow of the prescription period of requests and actions provided in paragraph 1, and if they have already begun, recognition of foreign main proceedings shall represent a cause for interruption of the prescription period of requests and actions concerned."*

38. It would appear that the Romanian legislation, rather than providing (as the Model Law does) that the effect of recognition of Foreign Main Proceedings does not preclude the commencement of an action to "preserve a claim" (in other words the issuing of a protective writ), it simply provides for the suspension of limitation periods.
39. Therefore, recognition of the English Scheme would suspend the claims in personal injuries against Efwon Trading and would operate to suspend the application for a winding up order.
40. COMI was never defined in the Model Law but it has been the practice to look to the Convention on Insolvency Proceedings of the European Union (from which document the

concept derives) when seeking to define it.[5] In practice this has meant that there is a reliance on CJEU jurisprudence in this area. The leading CJEU case is Eurofood IFSC Ltd Case 341/04. In that case the CJEU had regard to Article 3 of Regulation 2015/848 which reads "*The courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary*."

41. In Eurofood there was a dispute between the Irish and Italian courts over the true COMI of a subsidiary company – was it its own registered address or that of its parent company? The CJEU held that, "*in determining the centre of the main interests of a debtor company, the simple presumption laid down by the Community Legislature in favour of the registered office ... can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect*"
42. Therefore, when management, including the making of management decisions, and supervision of a company takes place in the same location as the registered office, in a manner that is ascertainable by third parties, the presumption in the Regulation cannot be rebutted. However, where a company's central administration is not in the same place as its registered office, a comprehensive assessment of all the relevant factors is needed In that particular case, the court held that the presence of company assets and the existence of contracts for the financial exploitation of those assets in a Member State other than that in which the registered office is situated could not be regarded as sufficient factors to rebut the presumption, unless the comprehensive assessment of all relevant factors pointed to that other Member State.
43. In the case study little information is given about the true day-to-day management of Efwon Romania. It may be difficult to persuade the Romanian Courts that the true COMI of Efwon Romania is not the place of its registered address and is in fact the UK. While there is no presumption specified in the Model Law, the factors which impel me to that conclusion are that Romania is where the drivers and machines are located (and presumably the rest of the support staff). Unless day-to-day operations are in fact directed from London (which seems unlikely) it is quite probable that the Romanian Court will find that the COMI is Romania.
44. If the Romanian Court is not satisfied that the COMI of Efwon Romania is in the United Kingdom, then it can still recognize the English Scheme as a Foreign non-Main Proceeding, if Efwon Romania has an "establishment" in the United Kingdom. Establishment is defined by Article 2(f) of the Model Law as "any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services". I think it is arguable

[5] UNCITRAL Model Law on Cross-Border Insolvency: A Judicial Perspective at p 32

that a Formula One Team (which presumably competes at Silverstone annually) might be able to show an establishment in the United Kingdom. The Model Law is silent on this issue, beyond what it says in Article 2(f).

45. In the UNCITRAL Model Law on Cross Border Insolvency: A Judicial Perspective it is stated that "*Whether an 'establishment' exists is largely a question of fact; no presumption is provided in the Model Law. Necessarily, that factual question will turn on specific evidence adduced. It must be established that the debtor "carries out a non-transitory economic activity with human means and goods or services" within the relevant State.171 There is, however, a legal issue as to whether the term "non-transitory" refers to the duration of a relevant economic activity or to the specific location at which the activity is carried on."*[6]

46. There is no minimum duration requirement to qualify as "non-transitory". Neither is there any positive requirement to maintain premises. I think that Efwon Romania could be argued to have an establishment in the United Kingdom for the following reasons:

    c. It has debts in the United Kingdom liable to Efwon Trading

    d. Its racing team regularly (i.e. annually) competes at Silverstone which by necessity requires external economic activity within the United Kingdom in the form of hotel reservations, restaurants, car or bus hire, the possible employment of local staff to assist with the trip/customs/visas, to conduct local marketing and the possible sourcing of tools and parts for the machines while in the United Kingdom.

47. This is a significant and recurring level of activity, albeit for a short time. To raise the bar for establishment too high would risk eliding the distinction between establishment and COMI.

48. If the Foreign Representative can obtain recognition of the Scheme as a Foreign non-Main Proceeding, he can then ask the Romanian Court for "any appropriate relief". Pursuant to Article 21 of the Model Law, this could include staying the commencement or continuation of individual actions or individual proceedings concerning Efwon Romania's assets, rights, obligations or liabilities. So, even if the COMI of Efwon Romania cannot be said to be in the United Kingdom, all is not lost. The purpose of getting recognition in Romania is to stay the personal injuries actions and stay the liquidation application pending the Scheme going through the processes in England, and possibly modifying the freezing injunction to allow for the implementation of any sanctioned Scheme. It may well be that the Romanian Court considers factors akin to Bluecrest when exercising this discretion. Success on this front will bring the drivers to the negotiating table much more readily.

49. There are two possible problems with this approach which will require considered Romanian legal advice. The first problem is the possibility that the Romanian courts consider that the recognition of the Scheme runs contrary to Romanian public policy. This is a reason for refusing

[6] UNCITRAL Model Law on Cross-Border Insolvency: A Judicial Perspective at pp46-47

recognition as defined in Article 6 of the Model Law. It must be borne in mind that the personal injuries claims in effect amount to workplace accident claims. There may or may not be a public policy imperative that requires those claims to be controlled tightly by the Romanian Courts in the public interest. Related to this is the possibility that the Romanian law of obligations has some rule similar to the *Gibbs* rule. If the drivers' claims are governed by Romanian law (and this is unclear from the case study) is a cram down in the English Scheme even possible without their consent?

50. The second possible problem is that the Romanian Court considers that the Scheme is neither a Foreign Main Proceeding, nor a Foreign non-Main Proceeding and thus not capable of recognition at all. This has happened in other cases.[7] In such a situation it will be necessary to know how the Romanian understanding of comity in private international law can assist the Scheme (if at all).

Steps to be taken in the United States of America

51. My advice to Mr Maximov would be to seek recognition of the Efwon Investment Scheme in the US pursuant to Chapter 15 of the Bankruptcy Code. The US has a very liberal approach to recognizing foreign insolvency proceedings. Although a Scheme of Arrangement may not be a standard collective insolvency procedure, US bankruptcy courts have recognised them as "foreign proceedings" under Chapter 15. Indeed, it is this liberal approach which I hope the Romanian courts will adopt.

52. Chapter 15 of the Bankruptcy Code allows the Foreign Representative of an eligible debtor to seek recognition of the debtor's non-U.S. "Foreign Proceeding." A "Foreign Proceeding" is defined under the Code as: "*...a collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation."*

53. Under section 1515 of the Bankruptcy Code, the representative of a foreign debtor may file a petition in a US bankruptcy court seeking "recognition" of a "Foreign Proceeding." Chapter 15, like the Model Law, contemplates recognition in the US of both a Foreign Main Proceeding and Foreign non-Main Proceedings.

54. Once the Scheme is recognised as a Foreign Main Proceeding, certain provisions of the Bankruptcy Code automatically come into force, including: (i) the automatic stay preventing creditor collection efforts with respect to the debtor or its U.S. assets (section 362, subject to certain enumerated exceptions); (ii) the right of any entity asserting an interest in the

[7] See Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd (In re) First instance: 374 B.R. 122 (Bankr S.D.N.Y. 2007) [CLOUT case no. 760]; on appeal: 389 B.R. 325 (S.D.N.Y. 2008) [CLOUT case no. 794]

debtor's U.S. assets to "adequate protection" of that interest (section 361); and (iii) restrictions on use, sale, lease, transfer, or encumbrance of the debtor's U.S. assets (sections 363, 549, and 552).

55. But can the US Courts be satisfied that the COMI of Efwon Investments is in the UK? The American and European approaches do differ, so what I have described above for Romania needs some revision for the US. The starting point is the same. Just as the European Insolvency Regulation 2015/848 creates a presumption that a debtor's COMI is the location of the debtor's registered office, there exists such a presumption in the US Bankruptcy code, too (see 1502(4)). The divergence comes in practice. As noted above, the European approach (as developed in Eurofood) sets a rather high bar for a party to overcome the presumption. The US courts have a much more pragmatic way of approaching the presumption. In the US the presumption is seen as a tool for speed and convenience, but it is a tool only. In cases of corporate groups (something not provided for in the Model Law) the US courts are keen to penetrate to the commercial realities of a situation rather than apply formalistic rules. (See Creative Fin. Ltd (In liquidation), 543 BR 514-15(Bankr. SDNY 2016).
56. This more flexible approach to COMI will protect Mr Maximov. He can legitimately say that the COMI of Efwon Investments is not Delaware at all, but the United Kingdom. While a Delaware company was used to raise finance, the operation of that investment is controlled from London, where decisions to set up subsidiaries and buy other subsidiaries are made.
57. Section 1507 of the Bankruptcy Code provides that, upon recognition of a Main or non-Main Foreign Proceeding, the bankruptcy court may provide "additional assistance" to a foreign representative. Any such assistance must reasonably ensure that: (i) all stakeholders are treated fairly; (ii) U.S. creditors are not prejudiced or inconvenienced by asserting their claims in the foreign proceeding; (iii) the debtor's assets are not preferentially or fraudulently transferred; (iv) proceeds of the debtor's assets are distributed substantially in accordance with the order prescribed by the Bankruptcy Code; and (v) if appropriate, an individual foreign debtor is given the opportunity for a fresh start.
58. Finally, section 1506 sets forth a public policy exception to the relief otherwise authorized in chapter 15, providing that "[n]othing in this chapter prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States." I do not see any issues arising in the case study which warrant a description of being “manifestly contrary” to US public policy.
59. Therefore, there is ample scope for a foreign representative to obtain recognition in the US and seek a stay on any claims against Efwon Investments pending the outcome of the Scheme in England.

What will the Schemes comprise?

60. I propose three separate Schemes. The first Scheme relates to Efwon Romania. There will be two classes of creditors. (1) Loan creditors; and (2) contingent creditors. This will pose some problems. There needs to be 75% approval (by value) and 50% approval by actual numbers of creditors in each class. The approval by value is hard to define in value terms because the value of the contingent claims is unknown. Assuming the number of drivers remains at 2, getting the consent of one driver might be possible.
61. Naturally, there can be a reduction of the Scheme to hard numbers, resulting in some horse-trading. Negotiation is likely, but as a starting position, offering 80c on the dollar will allow the debtor to reduce its overall exposure by 20%. This should be coupled with an agreement to issue new shares to KuasaNas so that KuasaNas can hold 51% of the shareholding. I am recommending that course of action because it is unclear if establishing a NewCo will allow for the continuation of the Super Licences.
62. As leverage in the negotiation with the drivers, the risk of Efwon Romania going into liquidation (which may itself result in the revocation of the Super Licences – a point which needs further investigating) is that the prospect of any meaningful recovery in the event of a successful claim is reduced if the company cannot trade. Equally, a loss of the Super Licences will result in (at least) a hiatus in the drivers' driving careers while they seek a new team.
63. Further, there is nothing in the case study which suggests that the claims are good claims, or that the drivers have the requisite evidence to substantiate those claims. An independent assessment of the risk to which Efwon Romania is exposed will be necessary to satisfy the Court that it should sanction the Scheme, but it might also have a sobering effect on the drivers if they realise that their claims are vulnerable, or likely to be appealed. Some thought needs to be given to just how much the drivers should be offered.
64. But Mr Maximov needs to be aware that he needs 75% by value and 50% by number of the drivers. Depending on the proportionate claims of each driver, this may in practice mean that he needs the consent of both of them.
65. For Efwon Trading, the Scheme will have only one class of creditors, the lenders (both Efwon Investments and the Monaco lender). Since Efwon Investments has debts amounting to USD350 and the Monaco lender's debt is USD100 million, the 75% and 50% thresholds are met if Efwon Investments approves the Scheme. The Scheme should incorporate the 80c on the dollar offer made at the Efwon Romania level (and be adjusted if the drivers successfully achieve an upward negotiation).

66. At the Efwon Investments level, the 80c on the dollar should feed through also, reducing its overall exposure by USD70million. This will impact Mr Maximov as well as the US lenders, which might help endear them to the reduction. The term of the loans by the US lenders should also be extended by 5 years (with interest at LIBOR +2%) to allow the new investment of KuasaNas to take effect and begin to show a return. This will also allow for the US lenders to increase the amount of interest they can make on this venture. Assuming a 1-year LIBOR rate of 1.34%, plus 2%, over 5 years on USD280million, that comes to simple interest of USD46.76 million, compensating for about two thirds of the haircut suffered. An option to convert some of Mr Maximov's debt into equity (with consequential issuing of shares to achieve 51% for KusasNas) should also be on the table as a negotiation tactic.
67. For completeness, I do suggest altering the security provided by way of pledge over the investment returns to be reduced to a pledge over 80% of the investment returns. This will allow KuasaNas to begin to recoup at least some of its (substantial) investment in the early years.
68. As a result, KuasaNas will have 51% of Efwon Romania (which may or may not be able to novate its obligations to a Malaysian company – it depends on the licencing rules). As a result, it will receive 51% of the 20% profits not secured and paid upstream, while the other 49% of the 20% profits not so committed can be reinvested on an ongoing basis.
69. Efwon Trading will continue to own Efwon Hong Kong, but that may be voluntarily wound up as a solvent company at a later date because it has performed its function and is no longer required. I am assuming for these purposes that the monies moving through Efwon Hong Kong have not been threatened and will continue to be paid without interruption until the end of the Kretek sponsorship in 2020.
70. I believe these Schemes will allow all stakeholders to maintain meaningful interest in the investment, secure decent returns and continue trading well into the future with the benefit of new money from KuasaNas.

Recognition and enforcement of Schemes once completed

71. Once the Schemes have been voted on and approved in England, they are recognisable in the US and in Romania. In the US, the same principles as described above apply and require no further elaboration here, except to say that the Scheme in relation to Efwon Investments would be recognised and enforced in the US under Chapter 15 of the Bankruptcy Code. In Romania., the situation is a little more complex.

72. Schemes of Arrangement were never a proceeding contained in Annex A of the European Insolvency Regulation. Completed Schemes were treated as judgments and thereby enforceable under the Brussels Regulation and/or the Lugano Convention. Assuming for the moment that the UK has not yet left the European Union, this would still apply in the case study, and the completed Schemes would be enforceable in Romania under the Brussels Regulation.

Counterfactuals

73. The advice sought in the case study is sought on the basis that the advice is required as of early 2019. For that reason I did not consider (i) whether the Restructuring Plan under s.26A of the Companies Act, 2006 was relevant or desirable (it did not come into force until mid-2021); (ii) whether the United Kingdom's departure from the European Union would impact on the recognition of the Schemes once completed; and (iii) the effect of the European Directive 2019/1023 which the case study suggested would not have been implemented in Romania until January 2020. I now consider each of these issues as counterfactuals in this case study.
74. A restructuring plan under s.26A of the Companies Act, 2006 might have been preferable to a standard Scheme of Arrangement because it allows for the cram down of creditors across classes (upon satisfying certain conditions). This would have reduced the leverage of the two drivers in any negotiation. Sadly, this path was not open to Efwon Romania given the timing of the request for advice.
75. As referred to above, the Brussels Regulation would have allowed the completed Scheme for Efwon Romania to be enforced in Romania before Brexit. If we assume that Brexit had already happened by the time the case study problem arose, this poses a problem. First, the Brussels Regulation would no longer have applied in the UK and would no longer have applied to UK judgments sought to be enforced in the EU. What options would have been available?
76. If the advice above was followed and English choice of law and choice of forum clauses were inserted in the relevant financial documents, the Scheme could be recognised and enforced in Romania on the basis of the Rome I Regulation which governs choice of law in contracts in the EU (notwithstanding that the UK will have left the EU). To that extent, the enforceability of the Scheme in relation to Efwon Romania need not give rise to any problems.
77. Let's assume that the Rome I Regulation was not engaged. The ordinary rules of Private International Law (as they are understood in Romania) would have been prayed in aid. Legal

advice in Romania would be needed to give an intelligent answer to the question of that would have affected the case study.

78. While the European Directive 2019/1023 will have been in force by January 2020, this is both after the period during which the advice was sought (early 2019) and before the date that the United Kingdom formally left the European Union (23:00 on 31 January 2020). I am, therefore, at a loss as to why it is relevant to the case study at all. Its impact is non-existent as of January 2019. Let's suppose, however, that the UK was still in the EU and Directive 2019/1023 was operative at the time of the proposed Scheme. Had this been the case, I might have been considering recital 13 to that Directive which says:

> "*(13) This Directive should be without prejudice to the scope of Regulation (EU) 2015/848. It aims to be fully compatible with, and complementary to, that Regulation, by requiring Member States to put in place preventive restructuring procedures which comply with certain minimum principles of effectiveness. It does not change the approach taken in that Regulation of allowing Member States to maintain or introduce procedures which do not fulfil the condition of publicity for notification under Annex A to that Regulation. Although this Directive does not require that procedures within its scope fulfil all the conditions for notification under that Annex, it aims to facilitate the cross-border recognition of those procedures and the recognition and enforceability of judgments*."

79. It is possible that had the Directive been in place for the purposes of the case study that a parallel Scheme for Efwon Romania could have commenced and been given effect in Romania. The Directive provides for, *inter alia*, a stay of individual enforcement actions (Article 6) amd a cross-class cram down (Article 11). These might have been useful tools had the problems of Mr Maximov arisen in a different period of time and in a different legal context.

Conclusion

80. For the foregoing reasons, I have recommended the use of the UK Scheme of Arrangement in the terms advised. Should additional information (or legal changes) come to light the advice will need revision.

Shane Quinn

21 February 2021